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NO. 87-982

In the
Supreme Court of the United States

OCTOBER TERM, 1987

DONALD HOLLEY,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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30 pp

QUESTIONS PRESENTED

Does a District Judge's failure to follow Federal Rule of Criminal Procedure 44(C) by warning a criminal Defendant of the dangers of joint representation require reversal only if joint representation would offend the Sixth Amendment's requirement of reasonably effective counsel?

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IN THE
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DONALD HOLLEY,

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VS.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit as reported at 826 F.2d 331 (5th Cir. 1987).

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on August 24, 1987, affirming the criminal conviction of Donald F. Holley. This Court has jurisdiction to review by writ of certiorari, under 28 USCA §1254(1).

RULE OF CRIMINAL PROCEDURE INVOLVED

The rule of criminal procedure involved is Fed. R. Crim. Proc. 44(C) which provides:

> "*Joint representation.* Whenever two or more Defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or

> assigned counsel who are associated in the practice of law, the Court shall promply inquire with respect to such joint representation and shall personally advise each Defendant of his right to the effective assistance of counsel, including separate representation. Unless it appeals that there is good cause to believe no conflict of interest is likely to arise, the Court shall take such measures as may be appropriate to protect each Defendant's right to counsel."

STATEMENT OF THE CASE

Count One of a Northern District of Mississippi indictment charged that Farmers Home Administration Itawamba County Supervisor Donald Holley, and part-time building inspector W. H. Hyland, committed a conspiracy:

> 1. To make false entries in the . . . books of the Farmers Home Administration with intent to deceive and to "share in and receive . . . money . . . through contracts of the FHA . . . with intent to defraud said institution", and
>
> 2. To falsely make and forge contracts . . . for the purpose of . . . obtaining money of the United States . . . with intent to defraud the United States . . . (An additional charge is then made but it is a sentence fragment and cannot be understood) . . . in violation of 18 USC §1006;"

(Indictment, Count I).

Count II of the Indictment charged that the Defendants Holley and Hyland had:

> "used and caused to be used" a "false writing . . . by using a . . . forged Farmers Home Administration contract . . . in the name of . . . Steve Browning . . . knowing he (Browning) had not

> made such contract . . . and (knowing) his signature was forged (in violation of 18 USC §1001)".

Count Three through Twenty-Six of the Indictment charged that on twenty-three different occasions, in 1981, and 1982, Holley and Hyland were guilty of:

> "making and causing to be made a false writing . . . by using a forged Farmers Home Administration contract in the name of Steve Browning . . . knowing Browning did not make the conntract . . . and that his (Browning) signature was . . . forged . . . (in violation of 18 USC §1001)"

The same attorney represented both Defendants. Despite Fed. R. Crim. Proc. 44 (C), the District Judge gave no warning of the dangers of dual representation. The phrase "conflict of interest" does not appear in the record.

Simply stated, the proof disclosed that Co-defendant Hyland (a FmHA Building Inspector) had signed his twelve year old step-son's (Browning's) name to numerous Farmers Home Administration repair contracts. The step-son (Browning) and various other family members had then performed the repair work. Government checks had been made to the Co-defendant's step-son, but Co-defendant Hyland's wife had signed her son's name to the checks.

While the proof showed Holley knew Co-defendant signed his step-son's name to the contracts, there was no proof that Holley knew that the Co-defendant's step-son did not *authorize* Co-defendant to sign his name. Nor was there any proof that Holley knew that the Co-defendant's step-son did not himself sign his own name to the checks. Despite the indictment's specific charge to the contrary, there was no evidence that the Defendant Holley had ever received any benefit from any of the transactions. R. 12-194.

In his own defense, Holley testified the repair work was completed on all of the houses, and that he never authorized any payment except where the repair work was done. R. 433.

He testified that the Browning-Hyland contracts came about when he could not get contractors interested in bidding on the numerous small repair jobs and Co-defendant had volunteered his step-son to do that work. R. 436.

Holley admitted he knew Co-defendant was signing his step-son's, (Browning's) name to the contracts, but Co-defendant had told Holley he was authorized to sign. It had not been unusual for one person to sign another's name in Holley's experience with the Farmers Home Administration.

R. 440.

After receiving the Court's charge, the jury returned to the courtroom and found both Defendants guilty on all Counts. R. 614-620.

The Court sentenced Defendant Holley to four years probation, suspending a two year prison sentence. R. 632. After imposing this sentence, the District Judge emphasized that Holley did not get any of the Government's money:

> "But I'm convinced that the Government--I don't know whether the Government ever gets its money's worth. However, I don't believe you got any of this contract money and certainly the investigative officer did not determine that these houses weren't repaired as they should have been. You will be under supervision for a period of probation, and I feel reasonabaly certain that you will never be back before this Court on probation violation".

R. 633.

Holley appealed to the Court of Appeals for the Fifth Circuit. The Court of Appeals found that although the District Judge had not followed Rule 44(C) by warning of the dangers of joint representation, reversal was not required because joint representation did not offend the "actual conflict" standards of United States Constitution Amendment Six.

ARGUMENT

THE WRIT SHOULD BE GRANTED, SINCE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ACTED INCONSISTENTLY WITH THE HARMLESS ERROR STANDARD OF RULE 52, FEDERAL RULES OF CRIMINAL PROCEDURE, AND ACTED INCONSISTENTLY WITH THE STANDARDS OF MANY CASES FROM THIS COURT AND OTHER COURTS OF APPEALS, CONTRARY TO THE FIFTH CIRCUIT'S HOLDING, TRIAL ERROR IS NOT REVERSIBLE ERROR ONLY IF THE CONSTITUTION IS ALSO VIOLATED.

Rule 44(c), Fed. Rules of Crim. Proc., is remarkably clear:

> "*Joint representation.* Whenever two or more Defendants have been jointly charged pursuant to Rule 8(b) or have been joined for pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the Court shall promptly inquire with respect to such joint representation and shall personally advise each Defendant of his right to the effective

> assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the Court shall take such measures which may be appropriate to protect each Defendant's right to counsel."

Congress' wisdom in adopting this rule is highlighted by the fact that there were many arguments Holley, if separately represented, might have made. To mention just a few:

First, the Indictment charged both Defendants with conspiracy:

> "to share in and receive directly and indirectly money and benefits through contracts of the Farmers Home Administration . . . with intent to defraud such instutition . . . "

There was overwhelming evidence that the Co-defendant Hyland received "directly or indirectly" benefits through the Farmers Home Administration. Indeed, either he or his wife received all the money from the contracts entered with the Farmers Home Administration. But there was no proof that the Defendant Holley shared in or received any money from the contracts. To the contrary, the District Judge observed at sentencing:

> "I talked at length with the probation officers. I wanted to know whether or not you got any of that money. I am convinced that you didn't. They're convinced you didn't."

R.629.

Too bad that Holley's attorney could not make the same argument to the jury that Judge Senter made at the

sentencing. But to tell the jury that Holley got none of the money, directly or indirectly, could only highlight the fact that counsel's other client, the Co-defendant Hyland, received over $40,000.00 "directly or indirectly" from the contracts.

Second, the Court instructed the Jury that:

> "A good faith belief that the contracts in question were made by Steve Browning and that his signature was genuine or *authorized by him* is a complete defense." (Emphasis supplied).

R.59.

Were it not for the fact that Hyland was also his client, counsel had, from this instruction, a marvelous opportunity to argue to the jury that Holley did not know Browning had not authorized his step-father to sign his name to the contracts. After all, would not a reasonable person assume that Hyland, a respected citizen, was acting with authority of his own step-son when he signed the step-son's name?

But the argument that Holley did not know that Browning had not authorized his step-father to sign the contracts, while making a "good faith defense" as to Holley, would have only pointed out the culpability of Co-defendant. After all, the step-son himself testified that he did not authorize Co-defendant to sign the contracts and knew nothing of them. The argument that Holley did not know the step-son's name was not "authorized" would be valuable to Holley but harmful to Co-defendant.

Perhaps the most appealing arugment for Holley was that he had no motive to intentionally use false contracts. Neither he nor his family was getting the money; he had nothing to gain. But Holley could not use this defense

because it incriminated Co-defendent, whose immediate family members were getting the money. If defense counsel said:

"Members of the jury, my client, Mr. Holley had nothing to gain by knowingly using a false writing; then, the Government would have responded, 'but Mr. Hyland sure had something to gain.'"

Despite the admitted fact that Rule 44(C) was not followed, and despite the fact that these many *potential* conflicts existed, the Fifth Circuit refused to reverse because it said there was no actual conflict. the Court reasoned that since both Defendants claimed at trial that they never received any of the money, and since both Defendants claimed at trial that they thought Browning's signature was authorized, their defenses at trial were "mutually supporting", not "actually conflicting" and that United States Constitution Amendment Six requires reversal only if the defenses at trial are "actually conflicting".

The injustice of the Fifth Circuit's opinion is self-evident.

First, it is obvious that if one must show that an "actual conflict" existed at trial, Rule 44(C) would never require reversal. The very fact that the Defendants were jointly represented at trial assures that a common stratedgy must be adopted. Since Defendants are represented by the same attorney, defenses must be adopted which are "mutually supportive". Since the Defendants have the same attorney, trial counsel does not have the option of adopting inconsistent defenses. The Fifth Circuit thus made the self-evident error or viewing the question of a conflict according to the positions actually adopted by counsel at trial, rather than according to the positions that *could* have been adopted had Rule 44(C) been

followed and separate counsel obtained. Obviously, an attorney who has a conflict of interest must necessarily adopt a common stratedgy at trial. His conflict of interest prohibits his adopting conflicting stratedgies, and an argument on behalf of one client which will incriminate the other. Thus, under the Court of Appeals' holding, there is no reason for a District Judge ever to follow rule 44(C). In all cases, an attorney with a conflict of interest, will necessarily adopt a common stratedgy at trial, and a Court, on review, can then studiously note a common stratedgy was adopted, and that there was, therefore, no conflict of interest. This preposterous result can be avoided only if this Court will hold the Fifth Circuit was in error, and the proper inquiry is whether there were available *potentially* conflicting defenses.

Second, the Court of Appeals' decision has the effect of rendering a solemn enactment by Congress practically meaningless. According to the Fifth Circuit, Holley has no greater rights than he would have if Rule 44(C) were never adopted. According to the Fifth Circuit, Holley stands in no different position than one who attacks his conviction for lack of effective counsel under United States Constitution Amendment Six. This Court surely does not intend Congress' enactments to have so little effect that they add nothing to what is already granted criminal Defendants by the United States Constitution. Indeed, in *Kotteakos v. United States,* 328 US 750, 90 LEd 1567, 66 SCt. 1239 (1946) this Court observed, though in dictim, that a direct departure from a "specific command of Congress" might well be a situation for reversal even where the harmless error standards of Rule 52 might otherwise preclude reversal.

However, the crucially important point is that the Fifth Circuit has now adopted an interepretation of Rule 44(C) which is inconsistent with the harmless error standards of Fed. R. Crim. Proc. 52, and which conflicts with

innumerable cases defining harmless error. Fed. R. Crim. Proc. in plain language, contemplates reversal for trial error except where "substantial rights" have not been affected. Until now, it has never been thought that reversal could be had only if trial error also amounted to Constitutional error. Until now, reversal followed from trial error unless the reviewing Court could declare beyond a reasonable doubt, that the error below did not effect the result. See, for example, *Chapman v. California*, 386 US 18, 17 LEd2d 705, 87 SCT. 824 (Federal Constitutional error is not harmless unless the reviewing Court can say beyond a reasonable doubt that the error did not affect the outcome); *Hanen v. United States*, 279 F2d 767 (8th Cir. 1960) (Error is not harmless unless the reviewing Court can say with "fair assurance" that the error did not affect the result); *Bhin v. United States*, 328 U.S. 633, 90 LEd. 1485, 66 SCt. 1132 (1946) (Erroneous ruling which relates to substantial rights is ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial); *United States v. Giacalone*, 588 F2d 1158 (6th Cir. 1978) (Test is whether there is any "possibility of prejudice" from trial error).

Had the standards of the above cases been applied, reversal would have followed. Under the above cases, the question would have been whether the reviewing Court could say beyond a reasonable doubt that the outcome of the trial was not affected by the trial judge's failure to warn Holley of the danger of joint representation. Had the proper test been applied, the reviewing Court could not have said, beyond a reasonable doubt, that Holley would not have heeded the trial Judge's warning about the dangers of joint representation, secured separate counsel, and won an acquittal with a lawyer who would have made the following argument:

"Ladies and gentlemen, this indictment charges a

conspiracy to receive, directly or indirectly, money from Government contracts. But my client, Mr. Holley, unlike the Co-defendant, did not receive "directly or indirectly" any Government money. The evidence has shown, without contradiction that all of this money went to the Co-defendent's family. My client did not receive any of this money, directly or indirectly. Why would he enter a conspiracy to receive money, directly or indirectly, if neither he, nor his family gets any of the benefits of it.

The Judge has also instructed you that you cannot find my client, Mr. Holley, guilty unless he knew that Browning's signature was not authorized. But the evidence has shown that the Co-defendant told my client that the signature was authorized. But the evidence has shown that the Co-defendant told my client that the signature was authorized. Now why should my client disbelieve the Co-defendant? One would think that if another person told him his step-son had authorized a signature, and if that person had, in the past, been truthful and honest, there was no reason to disbelieve this information. You heard Mr. Browning tell you that he did not authorize his step-father to sign the contracts. This certainly proves that the Co-defendant knew the signature was not authorized. But there is no proof at all that my client knew the signature was unauthorized."

Who can say that if Holley had separate counsel, the above arguments would not have been made? Who can say that if Holley had separate counsel, the above arguments would not have been successful? To a jury applying common sense, and following the literal charge in the indictment, they are appealing arguments. Therefore, under the proper standard--whether the Court can say beyond a

reasonable doubt that error was harmless--reversal would have been had.

Finally, it is significant that the Fifth Circuit's requirement of an actual conflict of interest, as if the case were being reviewed under United States Constitution Amendment Six, is inconsistent with at least two Court of Appeals' decisions.

In *United States v. Carrigan,* 543 F2d 1053 (2nd Cir. 1976), a trial judge failed to make an inquiry regarding conflicts between jointly represented Defendants. The Second Circuit followed the First Circuit rule that failure to make an inquiry raises a presumption of prejudice, and shifts the burden of proof to the Government to show the accused suffered no harm by the joint representation. 543 F2d at 1056.

Had the Fifth Circuit followed the standards of the Second Circuit in *Carrigan,* reversal would have been required. No reviewing Court could say that there was no "prejudice" from the failure to warn of the dangers of joint representation, since no Court could say, beyond a reasonable doubt, that Holley would not have heeded the trial Judge's warnings, obtained separate counsel, and successfully argued to the jury that it was the Co-defendant, and not himself, who stood to gain Government money by entering a conspiracy.

The Fifth Circuit's decision in this case is also inconsistent with a DC Circuit in *Campbell v. United States,* 352 F2d 359 (DC Cir. 1965). The DC Circuit in *Campbell,* announced the simple rule that there must be reversal whenever there was joint representation, whenever a Defendant has available defenses which are unavilable to a Co-defendant. 352 F2d at 361. In this case, Holley had available a defense of lack of motive which was unavailable to the Co-defendant. Holley had available the defense that

he had no motive to falsify contracts since he did not stand to receive "directly or indirectly" any money from the contracts. Thus, had the Fifth Circuit applied the standard of "inconsistent defenses" applied by the DC Circuit in *Campbell*, reversal would have been had.

CONCLUSION

The Fifth Circuit has made a unique interpretation of Appellate procedure in holding that a direct violation of the mandate of Congress of Rule 44(C) is grounds for reversal only if the Sixth Amendment right to effective representation of counsel was violated. This analysis is inconsistent with the harmless error standards of Rule 52, and is inconsistent with innumerable precedents which have held that a criminal case is to be reversed for any error except for "harmless errors", where the Court can say, beyond a reasonable doubt, that substantial rights were not affected. The decision is also inconsistent with other Circuits which have held that joint representation of criminal Co-defendants is grounds for reversal unless the court can say, beyond a reasonable doubt, that there was no prejudice.

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APPENDIX A

UNITED STATES DISTRICT COURT for NORTHERN DISTRICT OF MISSISSIPPI

United States of America vs.

DEFENDANT— DONALD F. HOLLEY

DOCKET NO.— CRE 86-25-S

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date—► **SEPT. 25, 1986**

COUNSEL ☐ Without Counsel However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

☒ With Counsel ...Falton O. Mason, Jr., Oxford...
Name of counsel

PLEA ☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☒ NOT GUILTY

There being a jury verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY, (Counts 1 through 26)

FINDING & JUDGMENT Defendant has been convicted of the offense(s) of conspiring to make false entries and statements in Farmers Home Adm. contracts (Title 18 USC Sec. 371) (Count 1); Making false statements in Farmers Home Adm. contracts (title 18 USC Sections 2 and 1001)(Counts 2 through twenty-six).

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisionment for a period of TWO (2) years; The execution of this sentence imposed is hereby suspended, and the defendant is placed on probation for a period of four (4) years as to Count One.

SENTENCE OR PROBATION ORDER

Counts Two Through Twenty-Six: The imposition of sentence is hereby suspended, and the defendant is placed on probation for a period of four (4) years. This period of probation shall run concurrently with the sentence imposed in Count One.

SPECIAL CONDITIONS Of PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The Court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

COMMITMENT

RECOMMENDATION

FILED
SEP 25 1986

SIGNED BY
X U.S. District Judge
☐ U.S. Magistrate

► /s/ L. T. Senter, Jr.

L. T. Senter, Jr. 9/25/86

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-4727

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DONALD F. HOLLEY,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern Disstrict of Mississippi

(August 24, 1987)

Before RUBIN, GARZA and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellant Donald Holley was tried jointly with W. L. Hyland, and both were convicted of conspiracy to make false entries in the records of the Farmers Home Administration (FmHA) and to participate in the profits therefrom, in violation of 18 U.S.C. § 1006, and to make false and forged contracts in violation of 18 U.S.C. § 495. Holley and Hyland were also convicted of 25 counts of making particular false contracts in violation of 18 U.S.C. § 1001. the defendants were represented by joint counsel at trial. Holley now appeals, asserting principally that the trial court erred in failing to conduct the requisite joint representation inquiry under Fed. R. Crim. P. 44(c) and also failed to advise each defendant of his right to separate representation under that rule. Holley does not challenge the sufficiency of the evidence supporting his conviction on

appeal. Although the district court failed to execute its responsibilities under Rule 44(c) we perceive no actual joint representation conflict of interest and AFFIRM.

I.

Three principal characters participated in this one and one-half year long saga that resulted in the approval of 43 separate FmHA repair contracts totalling $44,810. the first, appellant Holley, was an FmHA conty supervisor in Fulton, Mississippi responsible for overseeing the rehabilitation of vacant houses carried for resale in the FmHA inventory. The second, co-defendant Hyland, was an ex-carpenter and construction contractor, who at all times relevant to this case was an FmHA district construction inspector. Hyland inspected inventory housing to determine necessary repairs and to verify the satisfactory completion of such repairs. Finally, Steven Browning, Hyland's teen-age stepson, was an unwitting participant to the fraudulent contracts, but was sometimes employed to perform off-jobs at certain home sites.

Between April, 1981 and October, 1982 Holley approved 43 repair contracts on which Steve Browning was the named contractor. Hyland, with Holley's knowledge, signed his stepson's name to the contracts without Browning's consent or approval. Some of the work required under these contracts was performed by Hyland's family members, including Browning. Various other repair work, however, remained incomplete. Checks for the repair contracts were issued in the name of Steven Browning, were signed in Browning's name by co-defendant Hyland's wife, and were cashed by Browning's grandmother. At trial, Holley admitted that he falsely represented to an FmHA investigator that he witnessed Browning signing each of the repair contracts. Holley also admitted that Hyland signed Browning's name to the contracts, but he said that

this was common practice in his experience with the FmHA. He testified that in 1982, after reviewing the FMHA conflict of interest regulations, he discontinued authorizing contracts to Steven Browning. Holley and Hyland were both convicted and given suspended sentences with four years probation. Holley alone maintains this appeal.[1]

II

Appellant's primary assertion of reversible error is that the district court failed to comply with Fed. R. Crim. P. 44(c). That rule provides, in pertinent part:

> Whenever two or more defendants . . . are represented by the same retained or assigned counsel . . . the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation.

Fed. R. Civ. P. 44(c). The district judge in this case neither made the requisite inquiry nor rendered the appropriate advice. This error, appellant now urges, requires reversal. We disagree.

In *United States v. Benavidez*, 664 F.2d 1255, 1259 (5th Cir. 1982) we held that "even if the trial court fails to comply fully with the mandates of Rule 44(c), a defendant must still demonstrate an 'actual conflict of interest' before we will reverse his conviction." In *Benavidez* the trial court did inquire concerning joint representation, but it failed to "personally advise" the defendants of their rights as required by the rule. Although in this case the district court

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[1]Holley and Hyland filed a joint notice of appeal. Hyland voluntarily dismissed his appeal.

conducted neither an inquiry nor rendered the advice, this alone does not require a different result. As the Advisory Committee notes to Rule 44(c) state: "[t]he failure in a particular case to conduct a rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant." Fed. R. Crim. P. 44(c) Advisory Committee Note. *Benavidez* instructs that the goal of Rule 44(c) is to prevent conflicts that may be associated with joint representation. "The inquiry and advice provided by that rule are not ends in themselves; they are a procedure designed to prevent conflicts of interest." *United States v. Lyons*, 703 F.2d 815, 820 (5th Cir. 1983) (citation omitted). Evaluating the trial court's compliance with Rule 44(c) thus cannot be divorced from a showing that a defendant has been denied his sixth amendment right to effective counsel. "If there is no actual conflict, then the rule's purpose will not be served by reversal of a conviction." *Benavidez*, 664 F.2d at 1258. We do not condone the trial court's omission of its duty, although we add that careful government counsel should ordinarily wish to draw a court's attention to Rule 44(c). Relying upon *Benavidez*, however, we conclude that Holley must demonstrate a violation of his sixth amendment right to effective counsel resulting from the joint representation before his conviction will be reversed for the court's oversight of Rule 44(c).

The sixth amendment test, recently reiterated by the Supreme Court, is whether Holley can demonstrate that his attorney actively represented conflicting interests and the conflict adversely affected his lawyer's performance. *Burger v. Kemp*, 55 U.S.L.W. 5131, 5133 (U.S. June 26, 1987), (quoting *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067 (1984)). *See also Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708 (1980). This circuit has explicated the constitutional test as follows:

A conflict of interests is present whenever one

> defendant stands *to gain significantly* by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing.

Foxworth v. Wainright, 516 F.2d 1072, 1076 (5th Cir. 1975) (emphasis added). See also *Benavidez,* 664 F.2d at 1260; *Turnquest v. Wainright,* 651 F.2d 331, 333 (5th Cir. 1981).

Appellant, acknowledging the necessity of satisfying these standards, asserts that his counsel could have made three specific exonerating arguments, but for the joint representation of co-defendant Hyland. First, Holley claims that his counsel was precluded from arguing that he reveived none of the money from the FmHA contracts, "directly or indirectly", because this would have been damaging to co-defendant Hyland. this argument reveals counsel's misunderstanding of the nature of the charged offense. Count one charges Holley under 18 U.S.C. § 371 with conspiracy to commit substantive offenses against the United States. Completion of the charged offense is unnecessary to support a conviction for conspiracy. Actual receipt of money or benefits, as required by 18 U.S.C. § 1006, was therefore not required to convict Holley under count one. Additionally, it does not necessarily follow that if Holley never received any of the money, Hyland was *a priori* the "more culpable"party. In fact, at trial Hyland testified that he never received any money from the contracts either. this argument thus presents neither the requisite benefit to Holley nor the possibility of damage to the cause of codefendant Hyland sufficient to show an actual conflict.

Holley charges that he could not assert the defense of "no knowledge" that Browning's signatures were unauthorized because, he argues, this would incriminate Hyland. We do not share his view. Hyland testified that he *was* authorized by his stepson Browning to execute the

contracts. Not only is Holley's assertion non-detrimental to Hyland, but both parties' positions are mutually supportive.

Finally, Holley queries "was not an argument that Holley had no motive to commit the crime since he stood to gain none of the money, not an argument by which Holley stood to 'gain significantly' while 'damaging' Hyland?; We think not. this argument boils down to the proposition that defense counsel should or could have exonerated Holley by heaping more blame on Hyland. In *Benavidez*, this Court expressed skepticism that "there can be a constitutional violation when the only claim of conflict is that a defendant should have abandoned the common defense and invited reciprocal recrimination, not because the govenment introduced evidence indicating the defendant's innocence, but solely because the government made a stronger case against the codefendant." 664 F.2d at 1260. In any event, it appears that this last argument was presented to the jury. Holley testified that because of the difficulty of finding contractors to do this type of work, his main concern was with "getting the job done." His attorney in closing argument suggested that this concern indicated that Holley's motive for approving the contracts was not criminal in nature, but a "good-faith" effort to carry out the responsibilities of his job. Holley has offered no other evidence which would suggest an actual conflict between the co-defendants' positions regarding motive. He has directed us to no additional evidence or arguments that would have exculpated Holley but inculpated Hyland. *See United States v. Lyons*, 703 F.2d at 820. "Mere speculation about a conflict . . . is insufficient to establish ineffective representation." *United States v. Soudan*, 812 F. 2d 920, 926 (5th Cir. 1986) (citation omitted). Holley has not shown an actual conflict of interest.

III.

Appellant raises several other issues, each of which is meritless. First, Holley asserts that he should have been acquitted on count one because there is no evidence that he received or intended to receive any benefits from the FmHA contracts, and this is the "gravamen of the crime defined in 18 U.S.C. § 1006." This position founders on an evident misunderstanding of count one, which charged Holley and Hyland with conspiracy under 18 U.S.C. § 371, to violate 18 U.S.C. § 1006 and § 495. "When a conspiracy to violate two statutes is alleged, the jury may find the defendant guilty if they believe beyond reasonable doubt that he or she conspired to violated either one of those statutes." *United States v. Wilkinson*, 601 F.2d 791, 796 (5th JCir. 1979). *See also United States v. Ortizloya*, 777 F.2d 973, 982 (5th Cir. 1985); *United States v. Lyons*, 703 F.2d at 821. Count one, specification two charges Holley with conspiracy to violate 18 U.S.C. § 495 which provides criminal punishment against anyone who:

> falsely makes, alters, forges, or counterfeits any . . . .contract or other writing for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money . . . .

This provision requires no intent to participate in the benefits of the conspiracy; it depends solely upon Holley's having enabled another person to receive a sum of money from the United States. Holley does not challenge the sufficiency of the evidence supporting conspiracy to violate 18 U.S.C. § 495. Because the conspiracy to violate this provision is sufficient to support Holley's conviction under count one of the indictment, we need not address the sufficiency of evidence to support Holley's participation in a conspiracy to violate § 1006.

Second, Holley asserts that the district court erred in determining "materiality" as a matter of law. The trial court instructed the jury that "[t]he use of a false or forged name by Farmers Home Administration employees to obtain payment under a Farmers Home Administration contract is a fact material to a matter within the jurisdiction of the Farmers Home Administration." Holley asserts that because he could not present this issue to the jury, he was deprived of his right to have a trier-of-fact find all elements of an offense. This circuit has held, however, that "there are two historical exceptions to the general principle that the trial court must submit every essential element of the offense to the jury: questions of pertinency and materiality." *United States v. Bass*, 784 F.2d 1282, 1285 n.3 (5th Cir. 1986). *See also, United States v. Johnson*, 718 F.2d 1317, 1324 n.20 (5th Cir. 1983) (en banc) (materiality of false statements is a question for the court). Accordingly, the district court did not err in determining this issue as a matter of law.

Finally, Holley asserts that the district court failed to adequately define the elements of a substantive violation of 18 U.S.C. § 1006 as used in count one, and the term "forgery" in counts 2 through 26. Because no objections were made to these instructions at trial, we review only for plain error. Fed. R. Crim. P. 52(b). Having analyzed the instructions given to the jury, we are unable to find any such error. Relevant to count one, the district court adequately defined the elements of a conspiracy under 18 U.S.C. § 371, defined "knowingly" and "willfully", and read the relevant portions of the substantive provisions Holley was charged with conspiring to violate. Moreover, we find no error in the failure of the district court to define "forgery" with respect to counts 2 through 26. Under the indictment, the term forgery meant that Browning's signature was falsified. That a particular false document used to perpetrate the deception under 18 U.S.C. § 1001 was forged does not

transform a false statement offense into a forgery violation requiring intent to defraud.

For the foregoing reasons, we **AFFIRM** Holley's conviction.

Supreme Court, U.S.
FILED
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JOSEPH E. SPANIOL, JR.
CLERK

No. 87-982

In the Supreme Court of the United States

OCTOBER TERM, 1987

DONALD HOLLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court's failure to advise petitioner of his right to retain separate counsel and the risks of joint representation requires reversal of his conviction, even without any showing that his attorney labored under a conflict of interest that adversely affected his performance.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A4-A12) is reported at 826 F.2d 331.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1987. The petition for a writ of certiorari was filed on October 22, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Mississippi, petitioner was convicted on one count of conspiring to make false entries in the records of the Farmers Home Administration (FmHA) and false FmHA contracts, in violation of 18 U.S.C. 371, 495, and 1006, and on 25 counts of making

false statements to a government agency, in violation of 18 U.S.C. 1001. He was sentenced to a two-year term of imprisonment, which was suspended in favor of four years' probation.

1. In 1981 and 1982, petitioner served as a county supervisor for the FmHA in Fulton, Mississippi. One of his responsibilities was to oversee the rehabilitation of vacant houses held for resale by the FmHA. His co-defendant, W.L. Hyland, was a construction inspector for the FmHA during that period. Hyland, a former carpenter and construction contractor, inspected FmHA houses for necessary repairs and verified the satisfactory completion of those repairs. Pet. App. A5.

Between April 1981 and October 1982, petitioner approved 43 repair contracts in which Steven Browning, Hyland's 12-year-old stepson, was the named contractor. The evidence at trial showed that Hyland signed Browning's name to the contracts without Browning's consent or authorization. Although certain of the repairs specified in the contracts were completed by various Hyland family members, including Browning, many others remained unperformed. Checks for the repair contracts nevertheless were issued in Browning's name by the FmHA, were signed in his name by his stepmother, and were cashed by his grandmother. Pet. App. A5.

Petitioner testified at trial in his own defense. Although he had previously told an FmHA investigator that he witnessed Browning sign each of the repair contracts, he testified at trial that that statement was incorrect. Instead, petitioner testified, he knew Hyland was signing the contracts on Browning's behalf, but he did not regard that procedure as unusual when he knew both parties (4 R. 440, 484). Petitioner said he had not corrected the false statement he made to the investigator because he did not regard it as important at the time (4 R. 471-472). In addition,

petitioner asserted that in 1982, after reviewing FmHA regulations pertaining to conflicts of interest, he stopped approving repair contracts with Browning as the named contractor. Petitioner summarized his position at trial by testifying that he was just trying to get the repair work done, and while he may have violated some regulations, he did not have any intent to defraud the government. 4 R. 438-439, 442; Pet. App. A5-A6.

b. Petitioner and Hyland were represented at trial by the same attorney. On appeal, petitioner argued that his convictions should be reversed because the trial court failed to comply with Fed. R. Crim. P. 44(c). Petitioner noted that the trial court had failed to inquire into any potential conflicts of interest stemming from the joint representation and had failed to advise each defendant of his right to separate representation.[1] While agreeing that "[t]he district judge in this case neither made the requisite inquiry nor rendered the appropriate advice," the court of appeals nonetheless affirmed (Pet. App. A6). The inquiry and advice provided by Rule 44(c), the court concluded, are not ends in themselves; rather, they are designed "to prevent conflicts that may be associated with joint representation" (Pet. App. A7). The court accordingly

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[1] Fed. R. Crim. P. 44(c) provides that:

> Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

held that even where a trial court fails to comply with Rule 44(c), a defendant still must demonstrate "an actual conflict of interest" before his conviction will be reversed (Pet. App. A6).

Relying on this Court's decision in *Burger* v. *Kemp*, No. 86-5375 (June 26, 1987), the court of appeals noted (Pet. App. A7) that the appropriate inquiry is "whether [petitioner] can demonstrate that his attorney actively represented conflicting interests and the conflict adversely affected his lawyer's performance." Petitioner argued (*id.* at A8) that his defense conflicted with that of his co-defendant because, but for their joint representation, petitioner could have advanced several potentially exonerating arguments. The court of appeals examined each of those arguments and concluded (*id.* at A8-A9) that they were not inconsistent with any defense raised by Hyland. The court noted that, in fact, petitioner had presented at least one of those arguments to the jury. Because "[m]ere speculation about a conflict * * * is insufficient to establish ineffective representation," and because petitioner had "not shown an actual conflict of interest" as a result of the joint representation, the court of appeals affirmed (*id.* at A9 (citation omitted)).

ARGUMENT

Petitioner renews his claim (Pet. 6-8) that he was forced by his counsel's joint representation to forgo advancing several strong theories of defense at trial. Petitioner, however, simply repeats the arguments he made to the court of appeals; he fails to take issue with the analysis that led the court of appeals to conclude that no actual conflict of interest existed because he was not prevented from making any potentially exonerating arguments at trial.

Petitioner first contends that the court of appeals erred in concluding that he must demonstrate an actual conflict of interest in order to be entitled to reversal of his conviction. Petitioner appears to regard the court's reference to an actual conflict of interest as requiring proof that there be a conflict between the defenses actually adopted by the jointly represented defendants (Pet. 8). Since that is not likely to happen in any case where the defendants are jointly represented, petitioner argues that the court of appeals' rule would almost never result in relief despite a clear showing of prejudice to one or both of the jointly represented defendants. In fact, however, petitioner has misconstrued the court of appeals' holding. In order to obtain relief, the court held that a defendant must show that his lawyer actively represented conflicting interests and that the conflict adversely affected the lawyer's performance. Pet. App. A7. Such a conflict of interest, the court held, is present whenever one defendant " 'stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing.' " *Id.* at A8 (quoting *Foxworth* v. *Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975)). Thus, the fact that two defendants adopt consistent defenses is not the end of the inquiry, as petitioner suggests. Instead, the court of appeals recognized that a defendant can obtain relief in such a case if he can show that he would have benefited from an argument or evidence that would have damaged his jointly represented co-defendant.

Petitioner suggests (Pet. 9) that the mere possibility of prejudice should be enough to warrant reversal in a case in which the district court does not obtain a valid waiver of the defendant's right to separate representation. But there is at least a potential for a conflict of interest in every case of multiple representation. See *Cuyler* v. *Sullivan*, 446

U.S. 335, 348 (1980). Thus, petitioner is effectively arguing for a rule of per se reversal in every case in which two or more defendants represented by the same attorney are not expressly warned of the dangers of multiple representation.

The short answer to that argument is that it has already been expressly rejected by this Court, most recently in *Burger* v. *Kemp*, No. 86-5375 (June 26, 1987), slip op. 7 (quoting *Cuyler* v. *Sullivan*, 446 U.S. at 348), in which the Court stated: "We have never held that the possibility of prejudice that 'inheres in almost every instance of multiple representation' justifies the adoption of an inflexible rule that would presume prejudice in all such cases. * * * Instead, we presume prejudice only if * * * 'an actual conflict of interest adversely affected [a] lawyer's performance.' " See also *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984). Both *Burger* and *Cuyler* were state court cases to which Rule 44(c) had no application. But there is no reason why Rule 44(c) should change the relevant inquiry.

As the court of appeals noted (Pet. App. A7), Rule 44(c) is designed to implement the Sixth Amendment's guarantee that every criminal defendant receive effective assistance of counsel unhindered by conflicts of interest. So long as a defendant suffers no denigration of that right, the concern underlying Rule 44(c) and the Sixth Amendment itself has been served whether or not the text of the Rule has been followed to the letter. The advisory committee notes to Rule 44 make clear that a violation of Rule 44(c) was not intended to give rise to a per se rule of reversal: "[t]he failure in a particular case to conduct a rule 44(c) inquiry would not, standing alone, necessitate the reversal of a conviction of a jointly represented defendant." Rule 44(c) advisory committee note.

In this case, petitioner has not pointed to any way in which his defense was hindered by a conflict of interest

arising from the joint representation. Petitioner suggests (Pet. 6-8) that but for the joint representation, he could have made the following arguments at trial: (1) that he did not obtain any of the money that was paid to perform the contracts; (2) that he did not know that Browning had not authorized his stepfather to sign the contracts on his behalf; and (3) that he had no motive to assist Hyland in preparing and submitting the false contracts, since he was getting nothing out of the arrangement.

The first and third arguments are variations on the same theme: that petitioner gained nothing as a result of the illegal scheme and therefore must not have willfully participated in it. As the court of appeals observed, however (Pet. App. A9), petitioner made precisely that argument at trial: he testifed that he obtained no benefit from the "stepson contracts," and he testified that he regarded Hyland's use of his stepson as a contractor to be a permissible measure that helped get work done that otherwise would have been difficult to complete. There was nothing inconsistent between that defense and Hyland's defense—that the work was done properly and that Hyland did not receive any of the money from the repair contracts. It is highly doubtful that petitioner would have benefited by suggesting that Hyland was engaged in some serious impropriety to which petitioner was not a knowing party.

The second argument that petitioner proposes—lack of knowledge that Browning's signature was unauthorized—was also not at odds with Hyland's defense, and thus was not a theory that was rendered unavailable to petitioner because of the joint representation. The only way that a defense of lack of knowledge on petitioner's part would have been damaging to Hyland would be if Hyland had taken the position that he told petitioner he was not authorized to execute the contracts in Browning's name. In fact, however, Hyland's position was quite the opposite of

that: he testified that Browning had authorized him to sign on his behalf. By testifying that it was normal procedure for one party to sign FmHA contracts on behalf of another, petitioner explained why he had no reason to question the legitimacy of Hyland's signing for Browning. In effect, that theory of defense incorporated and gave an explanation for the theory that petitioner believed in good faith that Hyland was authorized to execute the contracts on Browning's behalf. Thus, as the court of appeals explained (Pet. App. A8-A9), the defenses of the two jointly represented defendants were entirely consistent on that point, and there was no showing that petitioner was prevented from pursuing any theory of defense that might have proved fruitful.

In sum, petitioner has failed to identify a conflict between Hyland's interests and any defense that petitioner might reasonably have relied on at trial. Rather, it appears that the most likely prospect for success lay in the joint defense that the procedure followed in executing and performing the contracts was a common one that got the work done and did not result in any loss to the government or any benefit to either defendant. In the absence of any showing that petitioner's defense was impaired by an actual conflict of interest, reversal is not required.[2]

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[2] Petitioner contends (Pet. 12-13) that the decision below conflicts with the decisions of two other courts of appeals. That is incorrect. The two cases upon which petitioner relies, *United States* v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976), and *Campbell* v. *United States*, 352 F.2d 359 (D.C. Cir. 1965), held that the failure of a trial judge to inquire into and warn against multiple representation creates a presumption of a prejudicial conflict of interest. But both of those cases were decided prior to this Court's decision in *Cuyler* v. *Sullivan, supra*, which rejected that position and adopted a somewhat different rule—that prejudice is presumed, but only if an actual conflict of interest adversely affected the attorney's performance. In any event, *Carrigan* and

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1988

Campbell were decided prior to the adoption of Rule 44(c) and thus have no bearing on the specific question presented here.

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